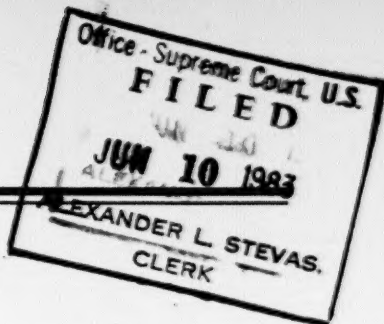


82-2052

No. _____



IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTION PRESENTED

Was the petitioner denied her due process rights when the court granted summary judgment to the respondents while there were still genuine issues of fact to be decided.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

TO: THE HONORABLE, THE CHIEF JUSTICE & ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES

AUDREY DEFEX, the petitioner herein, prays that a writ of
certiorari issue to review the judgment of the United States
Court of Appeals for the Second Circuit entered in the above-
entitled case on March 14, 1983.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit, Docket No. 82-7686 (2nd Cir. 1983) is printed in Appendix A hereto, *infra*, page 1a. The Judgment of the United States District Court for the Eastern District of New York is printed in Appendix A, *infra*, page 4a.

JURISDICTION

The judgment of the United States Court of Appeals For The Second Circuit (Appendix A, *infra*, page 1a) was entered on March 14, 1983. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner, a former employee of Pan American World Airways, Inc. (hereinafter referred to as "Pan Am") sought judicial review of her discharge from employment.

On or about October 7, 1980, petitioner, while working for Pan Am, sent in a letter of resignation. Subsequently, petitioner sought to rescind her resignation and sought the aid of her chief steward and business representative for International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 732 (hereinafter referred to as "IBT"). Petitioner's supervisor refused to rescind petitioner's resignation; however, petitioner was sent to a trained counselor on staff for an interview and petitioner agreed to a medical leave of absence which commenced on November 12, 1980. Petitioner had been suffering from a hand infection and was under her doctor's care and treatment.

Thereafter, petitioner received a letter dated December 4, 1980 from the staff counselor setting forth conditions as to petitioner's medical leave of absence. The letter dated December 4, 1980 required the petitioner to receive a specialist's certification in areas of skin rash condition and stress reaction.

Petitioner stated that she gave this letter of December 4, 1980 and the copy thereof dated January 27, 1981 to the chief steward of her union and requested that he continue her grievance. Petitioner also left a copy of the letter dated December 4, 1980 with the office of her union representative and with the officer of IBT, Local 732. Petitioner claimed that she was uncertain as to whether the union would file a new grievance or whether they would merge the new grievance as a continuation of her prior grievance. Petitioner claims that she was under the impression that respondent IBT would have filed her grievance.

Petitioner received a letter dated July 10, 1981, which set forth that petitioner would be unable to return from her

extended medical leave of absence unless she had received treatment for her conditions. Respondent Pan Am refused to accept the notes from petitioner's doctor with regard to her ability to return to work.

On or about July 22, 1981, petitioner instituted this action alleging that she was wrongfully discharged by respondent, Pan American World Airways, Inc. and that respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, failed to represent her properly in her dispute with her employer. Respondents moved to dismiss the complaint and for summary judgment on the ground that petitioner failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am. Petitioner opposed this motion. Judgment was entered after a hearing, for respondents dismissing the complaint and in favor of petitioner and against IBT, in the sum of \$500.00 on August 12, 1982, pursuant to a memorandum and order by Judge Pratt granting respondents' motions for summary judgment dismissing the complaint. Petitioner appealed to the United States Court of Appeals for the Second Circuit which affirmed the judgment of the District Court, finding that court properly granted summary judgment where no issue of material fact remained.

REASONS FOR GRANTING THE WRIT

Petitioner was a permanent employee of Pan American and had a property interest in her job. Moreover, petitioner was denied the right to a jury trial since the district court granted respondents' motions for summary judgment on the ground that petitioner failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am.

The District Court below recognized that the defense of non-exhaustion would not bar petitioner's suit against either the union or her employer if petitioner had reasonably relied upon the union to prosecute her grievance. *Schum v. South*

Buffalo Railway Co., 407 F.2d 328, 332 (CA 1974). The respondents' motions for summary judgment must demonstrate beyond a reasonable doubt that there is no issue of fact for trial. All inferences must be drawn against the movant. *Adikes v. Kress*, 398 U.S. 144, 157 (1970); *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Conley v. Gibson*, 355 U.S. 41 (1965).

The District Court set the matter down for a hearing on the sole issue as to whether the petitioner reasonably relied on the union to prosecute her grievance.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate only where "there is no genuine issue as to any material fact." Federal Rules of Civil Procedure p. 56(c). It has been held that cases in which the underlying issue is one of motive or intent are particularly inappropriate for summary judgment. See *Egger v. Phillips*, 699 F.2d 497 (7th Cir. 1982), citing *Baldwin v. Local Union No. 1095*, 581 F.2d 145, 151 (7th Cir. 1978). The Seventh Circuit stated in *Egger, supra*, that "(a) determination involving a person's state of mind is seldom susceptible to direct proof, but must be inferred from circumstantial evidence."

This is especially true where dismissal is sought in cases concerning a union's duty of fair representation. *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). Pursuant to the Railway Labor Act (RLA), IBT owed petitioner a duty of fair representation. See *Corbin v. Pan Am*, 432 F.Supp. 939, 943 (N.D. Cal. 1977). Even a fair presentation of a medically related grievance, but in a perfunctory way, may amount to a violation. *Curtis v. United Transportation Union*, 486 F.Supp. 966, 970 (E.D. Ark. 1980). The Supreme Court of the United States has held that a claim against a union for breach of its duty of fair representation is a discrete claim to be adjudicated in the District Court. *Czosek v. O'Mara*, 397 U.S. 25, 28, 90 S.Ct. 770, 772 (1970). Significantly, *Czosek* (which arose in the Second Circuit) concerned a union failure to process claims, which is the claimed breach in the instant case. See *Pratt v. United Airlines*, 468 F.Supp. 508, 510 fn. 4 (N.D. Cal. 1978).

In *Schum v. South Buffalo*, 496 F.2d 328 (2nd Cir. 1974), a former employer sued both company and union for refusing to allow him to return to work on medical grounds and violation of the duty of fair representation.

The Second Circuit reviewed the history of the RLA in some detail, including the doctrine of *Vaca v. Sipes*, 386 U.S. 171 (1967), excusing non-exhaustion of contractual or administrative remedies in a violation of duty of fair representation situation. The Second Circuit then squarely held:

“ . . . it seems clear that *Maddox* [*Republic Steel v. Maddox*, 397 U.S. 650 (1965)], *Vaca* and *Glover* provide ample legal bases upon which *Schum* would have viable causes of action against both his union and his employer.”

Schum v. South Buffalo, *supra*, 496 F.2d at 331.

Significantly, there was no allegation in *Schum* that the company and the union were in collusion. The only factual predicate required, was Schum's reasonable reliance upon the union to prosecute his grievance. 496 F.2d at 332.

Schum is controlling case law in the Second Circuit. It has been adopted by the Seventh, District of Columbia, and Ninth Circuits. *Pratt v. United Air Lines*, 468 F.Supp. 508, 512 (N.D. Cal. 1978). In its consideration of this area, a court in the Eighth Circuit, as well, adopted the rule of *Schum*. *Riddle v. TWA*, 512 F.Supp. 75, 78 (W.D. 1981).

After the limited hearing, the District Court found that the petitioner had not reasonably relied on the Union to prosecute a grievance on her behalf and granted respondents' motions for summary judgment. The Court of Appeals affirmed this judgment based upon its finding that petitioner failed to adduce credible evidence of reasonable reliance.

However, a review of the record reveals that petitioner set forth sufficient evidence to justify a denial of respondents' motions for summary judgment. The petitioner testified at the hearing that she gave a copy of the letter dated December 4, 1980 to the chief steward of her union and to a union officer

because she wanted to grieve this matter. Petitioner further testified that she was under the impression that the union might have merged her grievance with a prior grievance that she believed to be pending. Petitioner also brought the aggrieved letter to workmen's compensation in order to protect herself.

The chief steward of petitioner's union testified on cross-examination that if petitioner had filed a grievance in January, 1981, then it would not be necessary for her to file another grievance as to any letters received after January 1981 because there would have been an existing grievance. This testimony supports the petitioner's position that she believed that the union might have merged her grievance of the letter dated December 4, 1980 with her prior grievance.

The courts below did not draw inferences against the respondents (who were the movants for summary judgment) as required by law. Although there was sufficient credible evidence adduced upon the record to support the finding that petitioner reasonably relied upon the union to prosecute her grievance, the courts below granted summary judgment to respondents.

Based on the foregoing, the court below erred in granting summary judgment to the respondents. In the instant case, the courts below improperly drew inferences against petitioner, thus depriving petitioner of due process.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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**Counsel of Record*

APPENDIX

**Opinion and Judgment of United States Court of Appeals
for the Second Circuit**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

82-7686



At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of March, one thousand nine hundred and eighty-three.



P r e s e n t :

HONORABLE IRVING R. KAUFMAN,

HONORABLE AMALYA L. KEARSE,

Circuit Judges.

HONORABLE LLOYD F. MACMAHON,

*District Judge,
sitting by designation.*



AUDREY DEFEX,

Plaintiff-Appellant,

—against—

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. On motions for summary judgment made by Pan American and the Union, Judge Pratt granted a hearing on what appeared to be a contested issue. After the hearing he found that Defex had not reasonably relied on the Union to prosecute a grievance on her behalf and granted the motions for summary judgment. Our review of the district court's factual finding is especially circumscribed where, as in this case, the district court renders its decision after a resolution of credibility and the weight to be accorded witness testimony. *E.g., Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978).
2. A substantial basis existed for Judge Pratt's decision. Appellant testified to her familiarity with grievance procedures, and had employed the proper approach in the past. She conceded that not having filed grievance papers in this case was "unusual," and was able to offer no explanation of substance for this omission. Moreover, Defex admits she hoped to receive disability payments and she appears to have conceded this was the reason she did not pursue the normal grievance procedures.

3. Appellant's brief in this court advances a different reading of the hearing testimony than that adopted by Judge Pratt, but we are not permitted to substitute the conclusion urged upon us by appellant for the one reached by the district court, which found substantial support in the record.
4. Moreover, Defex had a full and fair opportunity at the hearing to rebut the allegation that there was no genuine issue of material fact for trial. Because appellant failed to adduce credible evidence of reasonable reliance, *see Ithaca College v. NLRB*, 623 F.2d 224, 229 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980), and therefore no issue of material fact remained, Judge Pratt properly granted appellees' motion for summary judgment. Fed. R. Civ. P. 56; *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317 (2d Cir. 1975).
5. Accordingly, the judgment is affirmed.
6. Appellee Pan American's request for double costs and attorney's fees is denied. *See Fluoro Elec. Corp. v. Branford Assocs.*, 489 F.2d 320, 326 (2d Cir. 1973).

IRVING R. KAUFMAN

Irving R. Kaufman,

AMALYA L. KEARSE

Amalya L. Kearse,

Circuit Judges.

LLOYD F. MACMAHON

Lloyd F. MacMahon,

District Judge.

**Judgment of United States District Court for the
Eastern District of New York**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
CV 81-2474 (GCP)

AUDREY DEFEX,

Plaintiff,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,

Defendants.

JUDGMENT

A Memorandum and Order of Honorable George C. Pratt, United States Circuit Judge*, having been entered on August 11, 1982, directing the clerk to enter judgment for defendants dismissing the complaint, and in favor of plaintiff and against defendant International Brotherhood of Teamsters in the sum of \$500.00, it is

ORDERED and ADJUDGED that judgment is hereby entered for defendants dismissing the complaint, and in favor of

* Of the United States Court of Appeals for the Second Circuit, sitting by designation.

5a

plaintiff and against defendant International Brotherhood of Teamsters in the sum of \$500.00.

RICHARD H. WEARE
Clerk of Court

By: JOSIAH KHARJIE
Josiah Kharjie, Deputy Clerk

Dated: Uniondale, New York
August 11, 1982

**Memorandum and Order of United States District Court
for the Eastern District of New York**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Docket No. CV 81-2474

AUDREY DEFEX,

Plaintiff,

—against—

PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN & HELPERS OF AMERICA,

Defendants.

APPEARANCES:

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MEMORANDUM AND ORDER

PRATT, C. J.:

Plaintiff instituted this action in June, 1981, alleging that she was wrongfully discharged by defendant Pan American World Airways, Inc. (Pan Am), and that defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (IBT), failed to represent her properly in her dispute with her employer. Defendants moved to dismiss the complaint on the ground that plaintiff failed to exhaust the mandatory grievance procedure established in the collective bargaining agreement between IBT and Pan Am. Plaintiff opposed the motion in an affidavit stating that, on or about January 27, 1981 she requested the union to grieve her dispute with Pan Am, and that during the period from January until July, 1981, when she was discharged, she thought that the union was pursuing her grievance. The parties agreed that the only grievance actually filed by plaintiff was dated July 27, 1981, after this litigation was instituted.

In a memorandum and order dated April 14, 1982, the court deferred decision on defendants' motion because of the existence of a genuine issue of material fact with respect to plaintiff's exhaustion of union remedies. Pursuant to FRCP 56(e), the court ordered a hearing to take testimony on this issue to supplement the documents filed on the motion. See Wright & Miller, *Federal Practice and Procedure* § 2723. In that order, the court indicated that if plaintiff had reasonably relied on the union to prosecute her grievance, the defense of non-exhaustion would not bar suit against either the union or

the employer, *Schum v. South Buffalo Railway Co.*, 407 F2d 328, 332 (CA2 1974). At oral argument, counsel for all parties had agreed that if testimony concerning plaintiff's reliance upon the union proved necessary, an evidentiary hearing before the court sitting without a jury would be appropriate.

The hearing was held on July 22, 1982. Plaintiff testified that in December 1980 and in January 1981 she received a letter from Pan Am explaining that she would not be allowed to return to work after her medical leave of absence until she provided documentation that she had been evaluated and treated by a certified medical specialist for her reactions to stress, *see* defendants' Ex. L. She testified that she gave a copy of the letter to George Miranda, a union officer, and told him that she wanted to grieve the matter. Miranda told her that he would be in touch with her. Plaintiff also testified on direct examination that she took a copy of the letter to the workers' compensation board because she doubted that she would get her job back through the union and that she hoped to be eligible for disability benefits.

On cross-examination, plaintiff testified that she had filed a handful of grievances during the 26 years she had worked for Pan Am and that she knew that the proper procedure was to obtain a grievance form from the union representative and to complete it and file it either with the representative or the steward. She had followed this procedure for each of her prior grievances. When questioned as to her reasons for not pursuing her claim with the union more vigorously, plaintiff stated that she did not push it, partly because she hoped she would be able to collect disability payments. She said that she thought it was unusual that she was not asked to sign a grievance form and that she suspected she was getting "a shafting".

Norman J. Marsich, the chief steward and local business representative for the union, testified that plaintiff never requested him to file a grievance for her, nor did she ask him to help her in any way after October, 1980. George Miranda testified that plaintiff complained to him concerning her medical leave of absence in early 1981, but that she did not ask him to file a grievance at any time.

The credible testimony indicates that plaintiff did not rely upon the union to file a grievance for her with respect to the conditions of her return to work after her medical leave of absence. Marsich and Miranda both testified, and the court finds as a fact, that plaintiff never asked them to file a grievance on her behalf. Plaintiff admitted that she did not pursue her grievance because she hoped to obtain disability payments, and she further testified that she was familiar with the grievance procedure and that she did consider it unusual that she was not asked to sign any grievance. In light of the testimony of Marsich and Miranda, plaintiff's own testimony, and her familiarity with the grievance procedure, the court finds and concludes that plaintiff did not reasonably rely on the union to prosecute a grievance. Thus, this case does not fall within the exception to the exhaustion requirement for good faith reliance upon the union enunciated in *Schum v. South Buffalo Railway Co.*, *supra*, 496 F2d at 331-32.

Pursuant to the Railway Labor Act, 45 USC § 151 *et seq.*, an employee must exhaust his or administrative remedies prior to bringing an action against an employer. In *Andrews v. Louisville & Nashville R. Co.*, 406 US 320 (1972), the Supreme Court held that the dispute resolution provisions of the RLA are mandatory, *id.* at 324-25, and that both the employee and the carrier have the duty to utilize the dispute settlement procedures provided by the act. *Id.* at 325.

In this case, a collective bargaining agreement existed which complied with the RLA and which provided a detailed procedure for grievances filed in response to disciplinary actions or discharge. Defendants' Ex. A. The court has determined that plaintiff did not utilize these procedures nor did she reasonably rely upon the union to prosecute a grievance for her. Therefore, defendants' motion for summary judgment dismissing the complaint is granted.

Motion for Sanctions Pursuant to FRCP 37.

By motion returnable June 16, 1982, plaintiff moved to compel IBT to answer plaintiff's interrogatories. Plaintiff had served the interrogatories on March 19, 1982, and requested a

response by April 19, 1982. IBT neither complied with the request nor asked for an extension of time. Rather, in early June counsel for IBT informed plaintiff's counsel that he had lost the interrogatories. The answers were finally served on counsel for plaintiff in late June.

On July 7, 1982, counsel for plaintiff and counsel for defendant Pan Am appeared for oral argument on plaintiff's motion for an order granting plaintiff her costs and attorney's fees on the motion to compel. Counsel for Pan Am took no position on the motion. Counsel for IBT did not appear to oppose the motion, and the court reserved decision.

Rule 37(d) of the Federal Rules of Civil Procedure provides that a court shall impose sanctions in the form of expenses and attorney's fees due to the failure of a party to serve answers or object to interrogatories "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." The court is aware of no such justification or circumstances in this case. Accordingly, plaintiff's motion for expenses and attorney's fees incurred by her motion to compel is granted, and plaintiff is awarded \$500 to be paid by defendant IBT.

The clerk is directed to enter judgment for defendants dismissing the complaint, and in favor of plaintiff and against defendant IBT in the sum of \$500.

SO ORDERED.

Dated: Uniondale, New York
August 9, 1982.

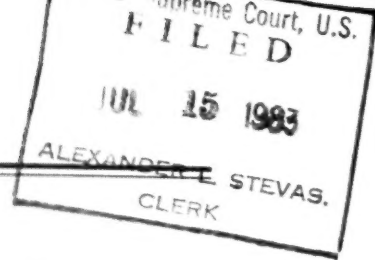
/s/ GEORGE C. PRATT

George C. Pratt
*U. S. Circuit Judge**

* Of the United States Court of Appeals for the Second Circuit, sitting by designation.

RECORD PRESS, INC., 157 Chambers Street, N.Y. 10007 (212) 243-5775

No. 82-2052



IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—V.—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN & HELPERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC. IN OPPOSITION

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Counterstatement of Question Presented

Whether the United States Supreme Court should grant Certiorari to petitioner after the United States Court of Appeals for the Second Circuit affirmed the judgment of United States District Court Judge Pratt of the Eastern District of New York, granting a motion for Summary Judgment against petitioner after a full evidentiary hearing.

List of Parent Companies, Subsidiaries and Affiliates

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all subsidiaries (other than wholly owned subsidiaries) of Pan American World Airways, Inc.

<i>Name of Subsidiary</i>	<i>Place of Incorporation</i>
Acerias Paz del Rio, S.A.	Columbia
Aeronautical Radio, Inc.	Maryland, U.S.
Air Cargo, Inc.	Delaware, U.S.
Air Carrier Supply, Inc.	Miami, U.S.
Airline Tariff Publishing Company	Washington, D.C., U.S.
Ariana Afghan Airlines Co. Ltd.	Afghanistan
Compania Hoteleira Novos Horizontes, S.A.	Brazil
Delsud Inversora	Argentina
Escola Americana de Rio de Janiero	Brazil
Honolulu Fueling Facilities Corporation	Hawaii, U.S.

<i>Name of Subsidiary</i>	<i>Place of Incorporation</i>
International Aeradio (Caribbean) Ltd.	Trinidad
Liberian Development Corporation	Liberia
Manhattan Air Terminal, Inc.	New York, U.S.
Middle East Real Estate Company, S.A.L.	Lebanon
New York Airways, Inc.	New York, U.S.
Pam Am Thrift Way Ltd.	England
Pan American Asset Management, Inc.	Delaware, U.S.
Pan American Energy, Inc.	Delaware, U.S.
Private Investment Company for Asia, S.A.	Malaysia
Promotora de Hotels de Turismo Medellin, S.A.	Colombia
Radio Aeronautica Paraguaya, S.A.	Paraguay
Social Inmobiliaria Norteamericana, S.A.	Argentina
Societe de Tourisme et Representation	France
Societe International de Telecommu- nications Aeronautiques	Belgium

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No. 82-2052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AUDREY DEFEX,

Petitioner,

—v.—

PAN AMERICAN WORLD AIRWAYS, INC. & INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN & HELPERS OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENT PAN AMERICAN WORLD
AIRWAYS, INC. IN OPPOSITION**

Opinions Below

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit, Docket No. 82-7686 (2d Cir. 1983) is printed in petitioner's Appendix, page 1a*. The first Memorandum and Order of Judge Pratt of the United States District Court for the Eastern District of New York, dated April 14, 1982, is reproduced in the Appendix herein, page A-1. The second Memorandum and Order of Judge Pratt, dated August 9, 1982, is printed in petitioner's Appendix, page 6a.

* The opinion of the Court of Appeals is not officially reported.

Constitutional and Statutory Provisions Involved

Petitioner alleges that the constitutional provision involved in this case is the Fifth Amendment to the Constitution of the United States. Respondent Pan American World Airways, Inc. denies that the Fifth Amendment is or has been involved in this action. The only statutory provision that ever has been involved in this action is the Railway Labor Act, 42 U.S.C. §151 *et seq.*

Statement of the Case

Petitioner was employed by Pan American World Airways, Inc. ("Pan Am") as a Senior Statistical Clerk in Catering Services at Kennedy International Airport, and was a member of Local 732 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("IBT" or "the union"). On October 7, 1980, petitioner submitted her resignation to Pan Am. This was the third time petitioner had resigned. On the previous two occasions, Pan Am permitted petitioner to rescind her resignations. However, Pan Am refused to permit petitioner to do so a third time.

The record below shows that petitioner sought the assistance of IBT, petitioner's exclusive bargaining agent, to rescind her resignation, after Pan Am had refused her request. The union met with Pan Am for this purpose. The union requested that Pan Am convert the resignation into a medical leave of absence so that petitioner could seek medical attention for psychological stress reactions, which she had displayed on the job, and for an extensive skin rash. Pan Am acceded to this request on the express condition that petitioner, before being allowed to return

to work, provide a letter from a specialist in psychological problems and a letter from a specialist in skin conditions certifying her fitness to return to work. Petitioner began her medical leave of absence on November 1, 1980, under these terms negotiated on her behalf by IBT. Petitioner did not file a grievance or seek to file a grievance concerning the leave of absence or the conditions for returning to work.

In early December, 1980, petitioner submitted to Pan Am a note from a skin doctor stating that her rash had been treated, and a note from her family doctor stating that she was "emotionally stable." In a letter to petitioner, dated December 4, 1980, Pan Am refused to accept the latter note in lieu of a psychological specialist's certification, as it did not comply with the express requirement that petitioner obtain a certification of health from a specialist in psychological problems. As the record evidence below shows, petitioner's family doctor was not such a specialist. Petitioner did not file a grievance or seek to file a grievance concerning Pan Am's refusal to accept her family doctor's note.

On January 27, 1981, Pan Am sent a letter to petitioner reiterating that petitioner must obtain certification of health from a "certified medical specialist" in "stress reaction[s]" before she could return to work. Petitioner did not respond to this letter, or file a grievance concerning the conditions set forth in it.

Pan Am again wrote to petitioner on February 12, 1981, informing her that her medical leave of absence would be extended to give her time to seek treatment for stress reactions. Petitioner did not grieve this extension. On March 11, 1982 Pan Am again wrote to petitioner requesting that she contact the Pan Am medical department to arrange for a medical examination by "a third party, dis-

interested evaluator." Petitioner ignored this request and did not grieve the issue. On April 11, 1981, Pan Am, once more, asked petitioner to contact the Pan Am medical department by April 27, 1981 regarding the status of her medical treatment. Petitioner did not respond or file a grievance. Pan Am wrote to petitioner again on June 8, 1981, asking petitioner to contact the medical department by June 19, 1981 regarding the status of her medical treatment.

Petitioner never responded to any of the letters sent to her by Pan Am and never filed a grievance or requested that a grievance be filed with respect to any of these letters or with respect to the conditions for her return to work. Finally, on July 10, 1981, Pan Am wrote to inform petitioner that she would be terminated, effective July 21, 1981, if she did not elect either to receive treatment for her stress reaction problems or to obtain a third-party medical evaluation. Petitioner did not accept delivery of this letter, and it was returned to Pan Am bearing the U.S. Postal Service stamp "Refused."

Petitioner was terminated effective July 27, 1981, but her termination was postponed until August 15, 1981, at her attorney's request. Petitioner commenced a lawsuit in the United States District Court for the Eastern District of New York on July 22, 1981, and five days later, on July 27, 1981, filed a grievance request with IBT, claiming that she had wrongfully been precluded from working since December 1, 1980.

Pan Am and IBT moved for summary judgment dismissing the complaint on the ground that petitioner had not exhausted her mandatory administrative remedies before commencing a lawsuit, and thus was barred under the Railway Labor Act from seeking relief in federal

court.* Petitioner opposed the motion on the basis that she had thought the union was prosecuting a grievance on her behalf.

Judge Pratt ordered, and all parties agreed to, an evidentiary hearing on the issue of whether petitioner reasonably relied on the union to file a grievance on her behalf. After the hearing on July 22, 1982, Judge Pratt made the following findings of fact upon the evidence: (1) petitioner did not rely upon the union to file a grievance for her with respect to the conditions of her return to work; (2) petitioner did not ask the union to file a grievance for her; (3) petitioner did not pursue her grievance because she hoped to obtain disability payments; (4) petitioner did not complete and sign a grievance form as she had done in all her prior grievances and, therefore; (5) petitioner did not reasonably rely upon the union to prosecute a grievance on her behalf. Judge Pratt granted summary judgment to Pan Am and IBT, and dismissed the complaint.

On September 2, 1982, petitioner filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit from the Order and Judgment of Judge Pratt granting dismissal of petitioner's complaint.

Petitioner's appeal was argued to the Court of Appeals for the Second Circuit on March 11, 1983 and in a decision dated March 14, 1983, the Second Circuit affirmed the

* According to the collective bargaining agreement between Pan Am and IBT, petitioner had access to bargained-for, mandatory grievance procedures to redress complaints concerning terms and conditions of employment. Under the grievance procedures, petitioner had ten days (seven days in the case of a discharge grievance) from the date that an alleged misapplication or misinterpretation of the agreement occurred to submit a written grievance to her immediate supervisor. Pan Am then would be given ten days to consider and respond to the petitioner's grievance (or seven days to conduct a hearing, in the case of a discharge grievance).

findings of Judge Pratt. The Second Circuit further noted that petitioner had had a full and fair opportunity at the evidentiary hearing to present evidence and to rebut the evidence presented by respondents.

ARGUMENT

POINT I

Summary Judgment Is Proper Where, as Here, There Exists No Genuine Issue of Material Fact

Petitioner alleges that the District Court improperly granted summary judgment to respondents by not drawing inferences against respondents, thereby denying her due process. Crucial to the issue of the propriety of the District Court's grant of summary judgment to Pan Am and IBT is the determination whether the facts allow any inference to be drawn from the record in favor of petitioner.

The record below is devoid of any evidence that petitioner—who undisputably did not file a grievance concerning the conditions and terms of her medical leave of absence—reasonably relied on the union to prosecute a grievance with respect to those conditions. The District Court expressly found that petitioner was fully familiar with the grievance procedure, and was aware at all times that IBT was not pursuing a grievance on her behalf. Thus, the District Court found the facts could not and did not support a finding that petitioner had relied in good faith on the union to pursue a grievance.

On review, the Second Circuit affirmed the District Court's grant of summary judgment, inasmuch as petitioner did not adduce an iota of evidence showing that she reasonably relied on the union to file a grievance on her behalf. As that was the single factual issue before the District Court, summary judgment was proper.

It is well settled that where a movant has satisfied his initial burden of demonstrating the absence of a genuine issue of fact, the burden then shifts to the non-moving party (petitioner in the instant case) to come forward with specific facts showing that there exists a genuine factual issue for trial. *Ruffin v. County of Los Angeles*, 607 F.2d 1276 (9th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980). Further, the evidence offered in opposition to the motion for summary judgment must be significantly probative as to any fact claimed to be disputed. *Id.* at 1280. Conclusory arguments do not constitute the significantly probative evidence required to create a genuine issue of material fact. *Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982).

Petitioner argues to this Court that there is sufficient evidence in the record below to defeat the grant of summary judgment to respondents. In support of this hollow allegation, petitioner points to the fact that she gave a copy of the December 4, 1980 letter which set forth the conditions of her continued employment with Pan Am to her union steward because she wanted to grieve the matter. However, petitioner did not ask that the matter be grieved. Rather, petitioner claims that she "thought" the matter would be handled by the union.

However, as the District Court found and the Court of Appeals affirmed, petitioner's assertion is severely undercut by her own admission that she had full knowledge of the grievance procedure and that she knew the mere giving of a copy of the letter at issue to the union did not constitute filing a grievance. Indeed, the record evidence demonstrates that petitioner had filed a "handful" of grievances during her twenty-six year tenure with Pan Am. In each instance, she followed proper procedure by obtaining a grievance form from a union representative, completing it, signing it and filing it with the union representative or the steward.

Thus, taking petitioner's allegations as true and drawing all inferences in her favor, her purported good-faith reliance is not supported even by her own testimony regarding her knowledge of the grievance procedure and the uncontroverted fact that in each prior grievance she had utilized that procedure. Therefore, summary judgment was properly granted. Summary judgment is proper if

taking the non-movant's allegations as true and drawing all inferences in his favor, the court is convinced from its review of the evidential sources available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. *See, e.g., United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1963) per curiam; *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882 (3d Cir. 1974).

Scott v. Plante, 532 F.2d at 945 (3d Cir. 1976).

Based on all the facts in evidence and drawing all inferences in favor of petitioner, the District Court found and the Court of Appeals affirmed that there was no genuine issue as to a material fact for trial. Therefore, petitioner's request for Certiorari should be denied, as it is founded simply on vacuous allegations that were categorically rejected below.

POINT II

Petitioner Had a Full and Fair Opportunity to Adduce Evidence Regarding the Existence of a Genuine Issue of Material Fact to Be Tried

In the District Court's first Memorandum and Order, dated April 14, 1982 (Appendix A, *infra*), Judge Pratt stated that under *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974), where a plaintiff alleging wrongful discharge by an employer can show reasonable reliance on the union to prosecute a grievance, the defense of non-exhaustion of a mandatory grievance procedure does not bar suit for wrongful discharge against either the union or the employer. Judge Pratt further found that a hearing pursuant to Rule 46(e) of the Federal Rules of Civil Procedure should be held on the sole issue of whether petitioner reasonably relied on the union to prosecute a grievance on her behalf. Petitioner's counsel agreed that an evidentiary hearing before the Court, sitting without a jury, would be appropriate. After the hearing, the District Court found as a fact that petitioner did not reasonably rely on IBT to prosecute her grievance. As discussed in Point I, *supra*, the Second Circuit Court of Appeals found the decision of the District Court to be supported by substantial evidence on the record as a whole.

Based on its findings of fact, the District Court in its second Memorandum and Order properly found that this case did not "fall within the exception to the exhaustion requirement for good faith reliance upon the union enunciated in *Schum v. South Buffalo Railway Co.*, *supra*, 496 F.2d at 331-332." Moreover, the Court noted that the exhaustion of administrative remedies is explicitly required by the Railway Labor Act and that the United States Supreme Court has held the dispute resolution provisions

of the Act to be mandatory. *Andrews v. Louisville & Nashville Railway Co.*, 406 U.S. 320, 325 (1972). Judge Pratt concluded:

In this case, a collective bargaining agreement existed which complied with the RLA and which provided a detailed procedure for grievances filed in response to disciplinary actions or discharge. The court has determined that plaintiff did not utilize these procedures nor did she reasonably rely upon the union to prosecute a grievance for her. Therefore, defendants' motion for summary judgment dismissing the complaint is granted.

Petitioner had a full and fair opportunity at the evidentiary hearing before Judge Pratt to present all her evidence on the question of whether she reasonably relied on IBT and to put forward any other evidence of allegedly conflicting facts. As the record below demonstrates, petitioner failed to put into the record any credible evidence as to her reasonable reliance on the IBT to prosecute her grievance. Indeed, when petitioner was questioned at the hearing below as to why she believed the union was processing her grievance, even though she had never seen a completed grievance form requiring her signature—as she had in every prior grievance—petitioner replied that she “thought it was unusual,” but she did not take any action to ascertain whether a grievance had actually been filed.

Further, petitioner's claim herein that there was sufficient testimony in the record below to support the finding that she had relied on the union to process her grievance is sheer invention. Quite to the contrary, there is absolutely no basis in fact for petitioner's claim that she believed an alleged grievance concerning the conditions for returning from her medical leave of absence had been “merged” with a prior grievance.

The record below demonstrates that petitioner's prior grievance already had been denied, and thus was closed, at the time she was granted a medical leave of absence. Further, petitioner conceded she had knowledge of this fact. Therefore, petitioner did not even have an existing grievance—and knew she had no existing grievance—into which the alleged grievance at issue arguably could have been merged. Petitioner did not adduce any evidence at the hearing to cure the inconsistencies in her own testimony or the incompatibility of her testimony with the documentary evidence.

After a full hearing, the District Court concluded that petitioner did not reasonably rely on the union. Moreover, on appeal to the Court of Appeals, petitioner again failed to advance any evidence showing that she reasonably relied on the Union to process the grievance at issue. Petitioner's request for review by this Court merely repeats testimony that the courts below have squarely rejected, and does not point to any material fact in dispute to defeat respondents' entitlement to summary judgment, nor to support her claim of denial of due process. Therefore, there is absolutely no basis for petitioner's appeal herein.

Finally, petitioner's argument that she was denied due process is a new theory of her case which was not urged below. This Court has consistently refused to hear questions or contentions urged for the first time as an afterthought on review here. See *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1982); *Miree v. DeKalb County*, 433 U.S. 25 (1977); *Blair v. Oesterlein Machine Co.*, 275 U.S. 220 (1927). Accordingly, as petitioner's request for review by this Court is founded on a belated, contrived and unsupported claim of deprivation of due process, it should be denied.

POINT III

Petitioner's Request for Certiorari Is Frivolous, Entitling Pan Am to Attorney's Fees and Appropriate Damages

Rule 49.2 of the Rules of the Supreme Court of the United States provides that "when an appeal or petition for writ of certiorari is frivolous, the court may award the appellee or the respondent appropriate damages." The Supreme Court's recent ruling in *Tatum v. Regents of Nebraska—Lincoln*, 51 U.S.L.W. 3883 (U.S. June 13, 1983), demonstrates that this Court does not hesitate to assess damages where an appeal is frivolous.

Further, a court may also require any attorney who has unreasonably and vexatiously multiplied the proceedings in any case, in any court of the United States, to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct. 28 U.S.C. § 1927; see *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893, 898 (2d Cir. 1982); *Bankers Trust Co. v. Publicker Industries, Inc.*, 641 F.2d 1361 (2d Cir. 1981); *Weiss v. U.S.*, 227 F.2d 72 (2d Cir. 1955), cert. denied, 350 U.S. 936, reh'g denied, 350 U.S. 977 (1956).

Additionally, 28 U.S.C. § 1912 permits this Court to assess double costs and attorney's fees for frivolous appeals. An appeal is frivolous when the result is obvious, see *Jaeger v. Canadian Bank of Commerce, California*, 327 F.2d 743 (9th Cir. 1964); or the arguments are wholly without merit, see *Libby, McNeil and Libby v. City National Bank*, 592 F.2d 504 (9th Cir. 1978). Resistance to findings of fact is also frivolous. See *National Labor Relations Board v. Catalina Yachts*, 679 F.2d 180 (9th Cir. 1982).

In the instant case, petitioner's request for review is so totally lacking in merit, conclusory in nature and un-

supported by the evidence that an award of damages to Pan Am, pursuant to Sup. Ct. R. 49.2 and 28 U.S.C. §§ 1912 and 1927, is fully justified. The petition for writ of certiorari consists of nothing more than a perfunctory, conclusory and obstinate reiteration of petitioner's very brief testimony at the evidentiary hearing below, in which petitioner herself conceded that she had not asked the union to file a grievance and had not filed one herself. This testimony was thoroughly considered by the District Court, reviewed by the Second Circuit Court of Appeals, and found patently insufficient. Petitioner's continued resistance to the findings of fact below can only be characterized as vexatious, warranting the imposition of sanctions by this Court.

Further, petitioner has totally failed to substantiate her argument—belatedly urged before this Court—that she has been denied due process. Rather, petitioner's claim of denial of due process is merely a pretext to obtain review by this Court.

Finally, the petition for writ of certiorari is conspicuously lacking any important reason for review, *see* Sup. Ct. R. 17, and therefore should be denied.

CONCLUSION

The judgment of the United States Court of Appeals dismissing petitioner's appeal should be sustained and Certiorari herein denied, together with sanctions against the petitioner.

Respectfully submitted,

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APPENDIX

A-1

Order of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. CV-81-2474

AUDREY DEFEX,

Plaintiff,

—against—

**PAN AMERICAN WORLD AIRWAYS, INC. and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN & HELPERS OF AMERICA,**

Defendants.

MEMORANDUM AND ORDER

APPEARANCES:

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Order of District Court

PRATT, J:

By motion argued on March 3, 1982, defendants Pan American World Airways, Inc. (Pan Am), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (IBT), move for summary judgment pursuant to FRCP 56 dismissing the complaint on the ground that plaintiff failed to exhaust the mandatory grievance procedure provided for in the collective bargaining agreement between IBT and Pan Am. Plaintiff opposes the motion, stating that she did make a request that the union file a grievance for her, but it was never pursued by the union. Since the union denies this plaintiff urges that there is an issue of fact which requires that the case proceed to trial on the merits. The court has considered the affidavits, exhibits, and memoranda of law submitted by the parties in reaching its determination that before the merits of plaintiff's claim are considered a hearing is necessary on the issue of whether plaintiff failed to exhaust the mandatory grievance procedure.

Plaintiff filed her original complaint in June, 1981, alleging that she was wrongfully discharged by defendant Pan Am, and that the defendant IBT had failed to represent her properly in her dispute with her employer. Defendants' motion for summary judgment is based on the argument that there is a mandatory grievance procedure in the collective bargaining agreement, and that no grievance was filed by plaintiff until after this lawsuit was filed. Plaintiff, on the other hand, states in her affidavit that she requested that the union grieve her dispute with Pan Am on or about January 27, 1981, and that during the period from January until July, 1981 when she was

Order of District Court

discharged, she thought that the union was pursuing her grievance.

In their papers and at oral argument, the defendants strenuously argued that there is no evidence of any grievance being filed by plaintiff, with the exception of the one filed on July 27, 1981, after this litigation was instituted. They further argued that plaintiff cannot defeat a motion for summary judgment merely by stating that there is an issue of fact. Counsel for plaintiff took the position that since there is an issue of fact over exhaustion, the court should ignore the exhaustion issue and proceed to the merits of plaintiff's claim.

The court disagrees with both arguments. There is an issue of fact here totally unrelated to the merits of plaintiff's claim, which, if resolved in favor of defendants, will result in the dismissal of the lawsuit. All parties agree that no actual grievance was filed by plaintiff before July, 1981. However, in *Schum v. South Buffalo Railway Co.*, 496 F2d 328 (CA2 1974), the Second Circuit held that where a plaintiff reasonably relies on his or her union to prosecute a grievance, the defense of non-exhaustion does not bar suit against either the union or the employer. *Id.* at 332. Therefore, it is necessary to determine whether plaintiff reasonably relied upon the defendant union to prosecute her grievance.

To resolve this issue of fact, the court must hear testimony relating to the statements in plaintiff's affidavit that she requested that the union file a grievance for her on or about January 27, 1981, and that in the months to follow she thought this grievance was being pursued. At oral argument, counsel for all parties agreed that if such testimony proved necessary, an evidentiary hearing before the

Order of District Court

court sitting without a jury would be the appropriate forum.

The evidence to be presented at the hearing should be limited to the questions of whether plaintiff did request that a union official file a grievance for her in January, 1981, whether she did subsequently rely upon the union to prosecute that grievance, and whether such reliance, if it existed, was reasonable. This may include such additional questions as: Was plaintiff's request timely? Was this a normal way to institute a grievance? Was plaintiff so familiar with grievance procedures that it was not reasonable for her to rely upon the union in this case?

The parties have indicated that some discovery is necessary before they can be prepared for such a hearing. Discovery shall be completed no later than May 7, 1982. On May 13, 1982, in a conference call to be placed by the plaintiff's attorney at 9:00 a.m., the court will schedule a time for the hearing, which will be on the earliest available date.

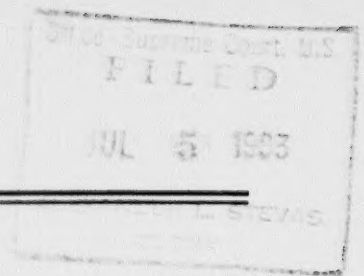
So ORDERED.

Dated: Uniondale, New York
April 14, 1982.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
U. S. District Judge

82-2052

No. _____



IN THE

Supreme Court of the United States

October Term, 1982

AUDREY DEFEX,

Petitioner,

-against-

PAN AMERICAN WORLD AIRWAYS, INC.
& INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN & HELPERS
OF AMERICA,

Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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1

COUNTERSTATEMENT OF QUESTION PRESENTED

Should the United States Supreme Court grant Certiorari after the United States Circuit Court of Appeals for the Second Circuit sustained the judgment of United States District Court Judge Pratt, granting a motion for Summary Judgment against the appellant after an evidentiary hearing?

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IN THE

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AUDREY DEFEX,

Petitioner,

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PAN AMERICAN WORLD AIRWAYS, INC.
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OF AMERICA,

Respondents.

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

POINT I

**CERTIORARI MAY NOT BE GRANTED
AFTER A CIRCUIT COURT OF APPEALS SUSTAINED
A JUDGMENT OF DISMISSAL BASED UPON
A FINDING OF FACT, UNLESS THE COURT CONCLUDES
THE FINDING OF FACT WAS UNSUBSTANTIATED
BY ANY FACTS IN THE RECORD.**

The record on appeal, at page A 221, sets forth that the District Court stated, "the Court finds as a fact that plaintiff never asked them to file a grievance on her behalf," referring to the defendant, Local 732 IBT. Nowhere in the record or the

brief of the Appellant is there any indication that the Court's finding was capricious or arbitrary and that its findings were not based upon any facts in the record. It is patently clear that the Court had ample basis for its findings and decision after a full evidentiary hearing, e.g. *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F. 2d 38 (2d Cir.), cert. denied, 439 U.S. 1039 (1978). The brief of the Appellant merely seems to complain of the Court's findings of fact without citing any legal basis for stating that the Court, "erroneously concluded that Plaintiff did not rely upon the Union to file a grievance."

POINT II

THE BURDENING OF THE SUPREME COURT WITH UNNECESSARY AND FRIVOLOUS APPEALS SHOULD BE DISCOURAGED BY IMPOSITION OF SANCTIONS.

For the reason that the Appellant has presented no valid legal basis for the reversal of the Circuit Court of Appeals' decision, that petition should be dismissed as frivolous and without any basis in law and that the Court herein should impose sanctions upon the Appellant and grant to the Appellee, attorneys' fees and damages together with costs and disbursements (Supreme Court Rules, 49.2).

CONCLUSION

The judgment of the United States Court of Appeals dismissing plaintiff's appeal should be sustained and Certiorari herein denied, together with sanctions against the Appellant.

Respectfully submitted,

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